FUSING CONSTRUCTION SDN. BHD.

v.

EON FINANCE BHD. (FORMERLY KNOWN AS KONG MING FINANCE CORP. BHD.)

HIGH COURT SABAH & SARAWAK, TAWAU
[ORIGINATING SUMMONS NO. T(24)-35 OF 1994]
TUAN IAN H.C. CHIN J
15 MARCH 1995

CIVIL PROCEDURE: *Parties - Application to add defendants - Joinder of parties - Whether suit affects intended defendants.*

CIVIL PROCEDURE: *Limitation - Whether defendant's counterclaim time-barred - Whether counterclaim contains arguable issue - Section 9 Limitation Ordinance (Cap 72) (Sabah).*

The plaintiff alleged that they have paid RM455,000 for the property Tawau Town Lease No. 107522261 registered to them on 29 March 1984. It was rented to Eon Finance for 10 years at a monthly rental of RM6,000 and a sum of RM354,000 had been paid as rental. The defence alleged that Eon Bank had wanted to purchase the property and it was orally agreed that the property be purchased and registered in the plaintiff's name but the plaintiff should charge the property to the defendants to raise the loan to reimburse Eon Bank. As such, the plaintiff held the property on trust for Eon Bank and the defendant was occupying the property rent-free. It was also alleged that Eon Bank was acknowledged by the plaintiff to be the rightful owner of the property to Bank Negara officials.

The plaintiff claimed a declaration that it was the registered and absolute beneficial owner of the property. Two weeks before the trial was scheduled to commence, Eon Bank and one Sia Uie Sung applied to intervene as defendants and be allowed to counterclaim for ownership of the property. They claimed that the property was held in trust for them or either of them. The plaintiff opposed the application to intervene on the grounds that (i) the claim was based on an oral agreement which was time-barred (ii) the claim was based on an oral trust which was unenforceable as it contravened the English Statute of Frauds 1677 and (iii) no evidence was proffered to support the existence of a trust.

Held:

[1] The subject matter of the action is the ownership of property. The rights or liabilities of Sia and Eon Bank to the plaintiff in respect of the property will be directly affected by the granting of a declaration in favour of the plaintiff which "direct affect on" is the test to be applied when considering whether to allow the application of Sia and Eon Bank. Sia and Eon Bank

would be forever barred if they do not apply to join as defendants to contest the plaintff's claim to ownership.

[2] The law on the issue of the trust not being in writing and the applicability of the Statute of Frauds 1677 is far from settled.

[3] Section 9 of the Limitation Ordinance does not impose a time bar and as such it is an arguable issue.

[4] Sia and Eon Bank had adduced sufficient documentary evidence to at least establish an arguable issue as to whether the money for the purchase of the property came from Sia or Eon Bank or from the plaintiff.

[Application to intervene allowed]

Cases referred to:
Hee Awa & Ors. v. Syed Muhammad Sazalay & Anor. [1988] 1 MLJ 300 ***(refd)***
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52 ***(refd)***
Yamamori (Hong Kong) Ltd. v. Davidson & Ors. [1992] 2 MLJ 410 ***(refd)***
Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor. [1992] 1 MLJ 697 ***(refd)***

Legislation referred to:
Limitation Ordinance (Cap 72) (Sabah), s. 9
Statute of Frauds 1677 (UK)

Other source referred to:
Cheshire, Fifoot and Furmston's Law of Contract, Singapore and Malaysian Edn., (1994) p. 346 & footnote 147.

For the plaintiff - Simon Shim; M/s. Shim, Pang & Co.
For the defendants - Ting E Hang; M/s. Ting & Co.
For the interveners - Paul Kan; M/s. Paul Kan & Co.

JUDGMENT

Ian H.C. Chin J:

This is an application by Sia Kie Sung ('Sia') and Eon Bank Bhd. ('Eon Bank') to be added as defendants in the action herein. Fusing Construction Sdn. Bhd. ('the plaintiff') had taken out the present originating summons against Eon Finance Bhd., formerly known as Kong Ming Finance ('Eon Finance'), claiming a declaration that they are the registered and absolute beneficial owners of the land and shophouse erected on Tawau Town Lease No. 107522261 ('the property'). The originating summons was heard on 14 October 1994 and I ordered pleadings to be delivered and I also gave directions for the trial of this action with the trial scheduled for six days commencing on 13 March 1995.

The plaintiff, by their statement of claim, allege that they have paid RM455,000 for property for which they became the registered owner on 27 March 1984. The property was, by a lease agreement dated 27 December 1983, rented by the plaintiff to Eon Finance for ten years at a monthly rent of RM6,000. A sum of RM354,000 had been paid as rental. But it was also alleged in the statement of claim that the plaintiff and Eon Finance had, on 6 November 1991, agreed in writing to submit the ownership claim to the property to Bank Negara and the plaintiff had pursuant thereto submitted their claim to Bank Negara on 8 May 1992 but Bank Negara had yet to make a decision and hence this action by which they claim a declaration that they are the registered and absolute beneficial owner of the property, arrears of rental totalling RM336,000, double rental from 1 January 1994 until delivery of vacant possession and interest.

Eon Finance, in their defence, allege that it was Eon Bank that wanted to purchase the property to carry out its banking business in Tawau and had approached one Sia Kie Sung, one of the intended interveners, to look for the property. It was, the defence continues, orally agreed between the plaintiff and Eon Bank that the property be 'purchased and registered in the plaintiff's name but that the plaintiff should charge the property to Eon Finance to raise the loan to reimburse Eon Bank. The property would also be leased to Eon Finance for ten years at a rental which was sufficient to cover the monthly repayment of the proposed loan. It is also alleged that Eon Finance would have an option to purchase the property from the plaintiff 'at a price the plaintiff would make a profit'. The full purchase price of the property was paid by Eon Bank. It was against the backdrop of this oral agreement that the plaintiff came to purchase and be registered as the owner of the property and that the plaintiff holds the property on a resulting trust for Eon Bank, Eon Finance alleges. As for the payments of the rental, Eon Finance maintained that they were paid under duress and threat of eviction and to prevent a run on Eon Finance and Eon Bank. It was also alleged that Eon Finance is occupying the property rent-free by the permission of Eon Bank and that Eon Bank was acknowledged by the plaintiff to be rightful owner of the property during a meeting with Bank Negara officials on 19 January 1989. A reply was delivered but I do not think it is necessary to advert to it.

It was against this background that on 27 February 1995, just two weeks before the trial was scheduled to commence, Sia and Eon Bank took out the present application to intervene as defendants and be allowed to counterclaim for ownership of the property. They claim that the plaintiff holds the property in trust for them or either of them. Sia, in his affidavit, related how he made payment for the purchase of the property and the related expenses after Eon Bank has asked him to do so and after Eon Bank had remitted to him the necessary funds. Things did not go according to the oral arrangement adverted to by Eon Finance due to disputes between the plaintiff and some shareholders of Eon Bank resulting in many suits being launched. Sia also launched his suit

in 1984 against the plaintiff regarding the property but it was dicontinued, after the agreement of 6 November 1991 to refer the matter to Bank Negara. As for Eon Bank, its regional manager, Lau Gah Liew, deposed an affidavit and elaborated on Eon Bank's decision to buy the property. Two gentlement named Abang Hj. Mohammed bin Abang Sarkawi and Ling Kuong Hua were the then directors of the plaintiff and had represented the plaintiff when the plaintiff orally agreed that the property was to be registered in the plaintiff's name, that Eon Bank was to furnish the money to Sia to make the purchase and which property was thereafter to be charged as mentioned earlier. There were other similar arrangements in respect of other properties elsewhere and the oral arrangements were carried through. Eon Bank also confirmed the written agreement of 6 November 1991 to refer the ownership claim to Bank Negara. The relevant provision of this agreement reads:

> 2(a) In relation to the Limbang property and the Tawau property, Fusing and KMB has agreed that the ownership thereto shall be determined by Bank Negara and the parties hereby expressly agree to abide by the decision of Bank Negara and act accordingly in terms of the decision.
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> (b) In pursuant (*sic*) to cl. 2(a) above KMB and Fusing shall, within fourteen (14) days from the completion of the acquisition agreement, submit to Bank Negara all relevant documentary evidence to substantiate their respective claims for ownership thereto provided always that prior to submission to Bank Negara, the parties hereto will consult Bank Negara in relation to the terms of reference for the determination of rentals and ownership of the Limbang property and the Tawau property and obtain Bank Negara's acceptance to the terms of reference.
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> (c) In the event that Bank Negara determines the ownership of the Limbang property and the Tawau property in favour of Fusing, then KMB shall forthwith pay to Fusing all arrears of rentals for the Limbang property and the Tawau property.
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> (d) In the event that Bank Negara determines the ownership of the Limbang property and the Tawau property in favour of KMB, then Fusing shall forthwith refund to KMB the sum of Ringgit Seven Hundred and Fifty Five Thousand (RM755,000) only being rentals paid for the Limbang property and the Tawau property.

In the just quoted clause, 'Tawau property' refers to the property, 'KMB' refers to Eon Bank while 'Fusing' refers to the plaintiff.

It was upon the history and facts of this case that I have just summarized that Mr. Simon Shim, Counsel for the plaintiff, submitted that the application for intervention ought to be dismissed because: (1) the interveners' claim is based on an oral agreement which was barred three years after the right to sue had commenced; and (2) the interveners' claim is based on an oral trust which is bad in law because a trust of immovable property must be in writing as required by the English Statute of Frauds 1677. There were two other

grounds and they were based principally on the inadequacy of evidence to support the contention of the existence of a trust. Mr. Ting E Hang, Counsel for Eon Finance, and Mr. Paul Kan, Counsel for Sia and Eon Bank, argued otherwise.

In summary, the plaintiff is claiming the property against Eon Finance while Eon Finance, though not claiming ownership, contend that the property belongs to Eon Bank from whom Eon Finance had obtained permission to remain in the property. Sia and Eon Bank are claiming the property to be theirs. Therefore, the subject matter of this action is the ownership of the property. It should be clear to all that the rights or liabilities of Sia and Eon Bank to the plaintiff in respect of the property will be directly affected by the granting of a declaration in favour of the plaintiff which 'direct affection' is the test to be applied in this case when considering whether to allow the application of Sia and Eon Bank to be joined as defendants. See *Hee Awa & Ors. v. Syed Muhammad Sazalay & Anor.* [1988] 1 MLJ 300; *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52; *Yamamori (Hong Kong) Ltd. v. Davidson & Ors.* [1992] 2 MLJ 410. Aside from that, Sia and Eon Bank would earn the stricture that was handed down to parties who knew of proceedings the outcome of which would affect their right and yet did nothing to apply to be joined as defendants. See *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor.* [1992] 1 MLJ 697 at pp. 724-725. Sia and Eon Bank may be forever barred if they do not apply to join as defendants to contest the plaintiff's claim to ownership of the property.

As for the issue of the trust not being in writing and the applicability of the Statute of Frauds 1677, Mr. Simon Shim himself had to concede that the law is far from settled and this came after I had questioned him whether there are other authorities on this point other than those in the list he submitted to the Court and learned Counsel thereafter referred additionally to *Cheshire, Fifoot and Furmston's Law of Contract,* Singapore and Malaysian Edition (1994) at p. 346 and footnote 147.

Mr. Paul Kan referred the Court to s. 9 of the Limitation Ordinance (Cap 72) (Sabah) and submitted that the proposed intervener's claim is not statute-barred. The section says:

> Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time.

That was submitted in answer to the argument that the claim was statute-barred since the action was not commenced within three years. The section, *supra,* at least makes the point an arguable issue.

The other grounds for opposing the joinder were, as mentioned earlier, related to the question of fact. It suffices for me to state here that Sia and Eon Bank had adduced sufficient documentary evidence to at least establish an arguable issue as to whether the money for the purchase of the property came from Sia or Eon Bank or from the plaintiff. In this regard, the plaintiff relied on a receipt issued to their name by the vendor but Sia and Eon Bank referred to a bank draft which the said receipt allegedly refers to and which bank draft was allegedly bought with the money from the account of Sia and which money Eon Bank had remitted to Sia. Again, it cannot be said that there is no substance in the claim of Sia and Eon Bank.

I therefore allow Sia and Eon Bank's application to be joined, respectively, as second and third defendant and they shall within 14 days hereof file their respective defence and counterclaim to the statement of claim of the plaintiff. The plaintiff shall have seven days after the service on them of the defence and counterclaim to deliver a reply and defence to the counterclaim. Sia and Eon Bank shall thereafter have seven days to reply. The plaintiff shall within 30 days thereafter take out a summons for directions for the trial of this case which has been postponed to 18 September 1995. Sia and Eon Bank should have applied much earlier to join as defendants but they did not and this has resulted in the postponement of the trial of this action. I will consider the question of costs after the trial of this action.

Reported by L. Nagarajan